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Transcript of Proceedings

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN BRANDS, INC.,
Plaintiff,

vs.

NATIONAL ASSOCIATION OF BROADCASTERS, COLUMBIA BROADCASTING SYSTEM, INC., NATIONAL BROADCASTING COMPANY, INC., AMERICAN BROADCASTING COMPANIES, INC., FEDERAL TRADE COMMISSION, PAUL RAND DIXON, PHILIP ELMAN, MARY GARDNER JONES, and A. EVERETTE MacINTYRE,
Defendants.

Civil Action
No. 3517-69

Deposition of COREY M. ALLEN

Washington, D.C.
23 December 1969

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CR #10020

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

AMERICAN BRANDS, INC.,
245 Park Avenue,
New York, New York, 10017,

Plaintiff,

vs.

NATIONAL ASSOCIATION OF BROADCASTERS,
1771 N Street, Northwest,
Washington, D.C., 20036;

COLUMBIA BROADCASTING SYSTEM, INC.,
2020 M Street, Northwest,
Washington, D.C., 20036;

NATIONAL BROADCASTING COMPANY, INC.,
1725 K Street, Northwest,
Washington, D.C., 20006;

AMERICAN BROADCASTING COMPANIES, INC.,
1124 Connecticut Avenue, Northwest,
Washington, D.C., 20036;

FEDERAL TRADE COMMISSION, PAUL RAND DIXON,
PHILIP ELMAN, MARY GARDNER JONES, and
A. EVERETTE MacINTYRE,
Washington, D.C., 20580;

Defendants.

Civil Action
No. 3517-69

Deposition of COREY M. ALLEN

Pennsylvania Suite,
Mayflower Hotel,
Washington, D.C.

Tuesday, 23 December 1969

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Deposition of COREY M. ALLEN, called for examination by agreement of counsel before George A. Monick, Notary Public in and for the District of Columbia, and Edwin F. Donovan, Court Reporter, when were present on behalf of the respective parties:

ON BEHALF OF THE PLAINTIFF:

ABE KRASH,
Arnold & Porter,
1229 Nineteenth Street, Northwest,
Washington, D.C., 20036.

Of Counsel:

JOHN D. HAWKE, JR.,
MELVIN D. SPAETH, and
JEROME I. CHAPMAN,
Arnold & Porter,
1229 Nineteenth Street, Northwest,
Washington, D.C., 20036.

ON BEHALF OF DEFENDANTS:

LEE LOEVINGER and HOGAN & HARTSON,
815 Connecticut Avenue, Northwest,
Washington, D.C., 20006;
on behalf of the
National Association of Broadcasters.

TIMOTHY B. DYK and SALLY KATZEN,
Wilmer, Cutler & Pickering,
900 Seventeenth Street, N.W.,
Washington, D.C., 20006;
on behalf of the
Columbia Broadcasting System, Inc.

WALTER J. KENNEY, on behalf of the
National Broadcasting Company, Inc.

JAMES LOFTUS, on behalf of the
American Broadcasting Companies, Inc.

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NATHAN DODELL, Assistant U.S. Attorney,
U. S. Courthouse,
Washington, D.C., 20001;
on behalf of the
Federal Trade Commission and Commissioners.

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C O N T E N T S

WITNESS:	DIRECT	CROSS	REDIRECT	RECROSS
Corey M. Allen	5	52	66	

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P R O C E E D I N G S

Thereupon,

COREY M. ALLEN

was called as a witness and, first having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DYK:

Q Would you state your full name?

A Corey M. Allen.

Q And your home and office address?

A Home address, REDACTED

Sullivan, Stauffer, Colwell & Bayles,

REDACTED is my business address.

Q That is the name of your employer?

A Yes, sir.

Q What is your title?

A Senior Vice President, Manager Supervisor.

Q How long have you been with Sullivan?

A Slightly over a year.

Q What are your duties?

A To manage all American Tobacco business at SSC&B.

Q Now, what was your previous employment?

A I was at CBS for the last nine years.

Q In what position?

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A My last position was Director of Sales of the Eastern Division of the CBS Television Network.

Q How about before that?

A I was eight years a salesman there.

Q What was your employment experience before that?

A I was at SSC&B for nine years.

Q What were your duties there?

A I was a producing, director and new program developer.

Q Did that have anything to do with American Tobacco Company as it was then advertising?

A They had campaigns.

Q Did you work on it then?

A Yes.

Q Prior to your first tenure at SSC&B, what was your employment before that?

A I was a radio producer.

Q A radio producer?

A Yes, I worked for a producer.

Q Had you had any earlier experience in advertising?

A No.

Q Can you tell, briefly, what your responsibilities were at CBS when you became head of the Eastern Sales Division?

A Well, I guess there were ten or eleven network

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salesmen who reported to me and I would go over their plans with them, different presentations.

Q Some of the advertising involved was cigarette advertising, wasn't it?

A Yes.

Q And some of that advertising was for American Brands, wasn't it?

A Yes.

Q In the course of your duties did you hve occasion to deal with people in the program practices department?

A From time to time.

Q What was the nature of your dealings?

A Well, I guess mostly to introduce people to them that had a problem on their copy. The network wouldn't take it or instruct them to be sure to clear their copy with the clearance people.

Q Did you ever help advertisers resolve difficulties with the program practice department?

A Not that I can recall.

Q Were you aware of the functioning of the program practices department?

A Yes.

Q In detail?

A I knew it quite well, yes.

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Q Now, can you give us a brief outline of how your agency prepares, submits copy for advertisements in the nature of its dealings with its client, the advertiser and the network?

A It is not always the same way. Some things are presented in much roucher form than other things. We create a sales message, which in the case of television we would, for the most part, maybe always check with the client. First of all we would sell it to the client. I mean, he would have to buy our creative concept. Then we would go to the network for clearnace of story boards. They would get back to us and then we would proceed to make the television commercial.

Q What would happen after that?

A After we made the TV commercial?

Q Yes.

A It was sent to the networks again and they reserved the right for final approval of the finished product. Then we would almost always be in a hurry to get it on the air and we would probably schedule it 72 hours later to miss a late charge.

Q How much is the late charge?

A I don't think all three networks are the same. I think once it had been $1,000, it might have gone up from that.

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Q Is it often wavied?

A People are not usually -- well, it depends on the circumstances. If you are known, I am speaking from the network end now, if you are known to be dilatory, you would get hit with the charge. But if people knew that wasn't your normal method of operation, on occasion they would overlook it.

Q Whom do you deal with at American Brands?

A I deal with many people. Bill Moore is one primarily, because Pall Mall is my primary account and he is the man I deal with directly. I deal with Phil Cohen less frequently, all the brand men, media occasionally, very rarely.

Q Your agency handles creative work for Pall Mall Golds, it doesn't handle Silva Thins, does it?

A No, it does not.

Q But it does handle Pall Mall Gold?

A Yes.

Q Who do you deal with at American Brands on matters relating to compliance with the NAB Code?

A Well, I generally deal with them in the NAB Code, usaully when I deal with them on the television commercials we clear our copy with the network.

Q Suppose the network doesn't clear the copy?

A Then we have a problem.

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Q And then you go back to American Brands?

A And discuss what the problem is and is there some way we can correct the problem and still salvage the commercial.

Q Do they suggest sometimes if the network has rejected the commercial that you go to the NAB for interpretation of the guidelines?

A No.

Q But you do do that sometimes, don't you?

A No, I don't. I did it once at the suggestion of Norman Nielsen.

Q But you only worked there for a year?

A Yes.

MR. CHAPMAN: Let the record show Mr. Nielsen is the director of program practices for CBS.

BY MR. DYK:

Q Mr. Allen, I would like you to look, if you would, at CBS Exhibit 2, which is an excerpt from the current unsigned agreement between your agency and CBS, I believe.

MR. HAWKE: I will object to the characterization of it as an agreement of any sort.

BY MR. DYK:

Q The agreement is between CBS and American Brands --

MR. HAWKE: I object to this characterization of this document as an agreement.

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MR. DYK: It purports to be an agreement between American and --

MR. HAWKE: I think we stipulated on the record last Friday that this piece of paper was an excerpt from a document that bore the names -- well, whatever the stipulation was, the record will show what it was.

BY MR. DYK:

Q When you negotiate an agreement between CBS Television Network and any other network --

A I don't negotiate agreements.

Q Do you know whether the agreements that are negotiated are between the network and American Brands?

A i wouldn't know until a year ago.

Q Pardon?

A I wouldn't know since I left CBS.

Q But you knew when you were at CBS?

A Yes.

Q Now, hasn't it been the practice in the past for American Brands to sign agreements with CBS?

A I don't know.

Q Are you familiar with the provisions of paragraph 9 set forth in CBS Exhibit 2?

A No.

Q You never have seen these before?

A No.

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Q Never seen the printed contract --

MR. HAWKE: That is the third time the question has been asked and he answered twice no.

MR. DYK: Could he answer it once more?

MR. HAWKE: No, we have three more witnesses after this and I think once is enough for any question.

MR. DYK: It would take less time for him to answer.

MR. HAWKE: He answered it no twice.

MR. DYK: He has never seen the printed agreement at CBS, that was the question.

THE WITNESS: I don't believe I have. I could verify that.

Q You say you could verify it?

A No, forget it.

Q What did you want to clarify?

A Well, the CBS sales department never saw these things, they saw a summary form. They never saw a detailed contract.

Q Well, it was the printed contract which was the question. I didn't mean this specific one.

A No.

Q You never saw the printed contract?

A No.

Q All right.

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Are you familiar with the operation of the NAB Code Authority?

A Not in detail.

Q But in general?

A I get confused between the Code Board and the Code Authority. I know they are both part of the same thing.

Q The whole organization, particularly insofar as it relates to the NAB Code and the NAB guidelines?

A Yes.

Q Now, you are aware, aren't you, of the new NAB Code guidelines relating to tar and nicotine advertising for cigarettes promulgated on October 21, aren't you?

A Yes, I am.

Q Can you state for the record what those requirements are?

A I can't do it accurately. There are some sporting parts, going to a game and coming from a game. I don't know in detail.

Q How about the provisions relating to tar and nicotine?

MR. HAWKE: We are talking about the provisions of what?

MR. DYK: The NAB guidelines. I would like the witness to do it, if he could, without refreshing his recollection.

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MR. HAWKE: All right.

THE WITNESS: What do I understand them to be today?

MR. HAWKE: You are talking about the guidelines insofar as they relate to tar and nicotine?

MR. DYK: Yes.

THE WITNESS: That if you make claims low, lower, reduced or comparison, you must show the highest tar and nicotine, the lowest tar and nicotine, your own tar and nicotine and if you compare it to a specific cigarette you must name the other cigarette and show its tar and nicotine.

Q Anything else?

A (No response.)

Q Is that all?

A I believe that is all.

Q Now, is it easy for an advertiser to comply with these guidelines who is advertising tar and nicotine?

A Is it easy to comply with these?

Q Yes.

A It is very difficult to comply with them.

Q Why?

A Well, first of all I don't want to change anything I am doing. I don't want to change a word of what I am doing. But anything that I do to change what I am doing I think is going to have a bad effect on the sales of my product.

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Q Anything?

A I can't think of anything I would like to change.

Q But you can't state more specifically what the FTC policy adopted by the NAB would create difficulty for you?

A Oh, another thing, audio and video is another part of this.

MR. DYK: Could the record show that --

MR. KRASH: I absolutely did not say one damn word to him. You are eaves dropping on something I said to my counsel. Did the witness hear anything I said?

THE WITNESS: I did not.

MR. KRASH: Do you want to apologize to me?

MR. DYK: No.

MR. KRASH: Well, I want an apology. I did not say one word to the witness. May I talk to my counsel without your eaves dropping on me.

MR. DYK: As long as you do it without my hearing.

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BY MR. DYK:

Q What are the difficulties it would create?

A Doing all of these things in a 30-second commercial. Stating all the things I have to say. I don't think any of those things really sell my product and it leaves me very little time to sell my product. Next to no time at all.

Q Any other problems?

A Well, I don't want to change anything.

Q When did you first become aware of the new FTC and NAB guidelines?

A I don't know precisely.

Q You don't know what month?

A No.

Q Did you have discuss these with anyone at American Brands?

A The month?

Q No, the guidelines. Have you ever discussed them with anybody at American Brands?

A Yes.

Q Who?

A Bill Moore.

Q Anybody else?

A I don't believe so.

Q When did you have these discussions?

A I don't know.

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Q You don't know what month?

A I would guess October.

Q Did Mr. Moore inform you of the existence of the guidelines?

A No.

Q You knew about them before you spoke to him?

A Yes.

Q How did you find out about them?

A Well, I first knew about them, I believe, in a newspaper I saw something.

Q What did it say. Do you remember?

A Well, it was -- I don't remember precisely what it said, no.

Q Generally?

A Generally that there are going to be new guidelines.

Q And what would they require?

A I can't remember the article at the moment.

Q You can't remember the article?

A I don't remember specifically what the paper said.

Q Have you ever seen a copy of the October 22, 1969, letter from Mr. Helffrich to Mr. Hetsko?

A Yes, I know I saw that.

MR. HAWKE: Which exhibit are you referring to?

MR. DYK: I believe it is Plaintiff's Exhibit 9.

MR. HAWKE: That is not a letter to Mr. Hetsko.

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To move things along, Plaintiff's Exhibit 9 is identical to a letter sent Mr. Hetsko; I just want to make sure we are talking about the same document.

BY MR. DYK:

Q So you did see this letter to Mr. Hetsko?

A I never saw a letter to Earl C. Clements.

Q Counsel is stipulating that an identical letter was sent to Mr. Hetsko and I take it you saw the identical letter sent to Mr. Hetsko?

A Yes.

Q When did you see that letter?

A After a meeting with Norman Nelson on November 25. I was given the letter.

Q By whom?

A Bill Moore.

Q How did he happen to give you the letter?

A Because I was told at the meeting of November 25 by Norman Nelson that we would have to make changes in our commercial.

Q And then what happened?

A I was discussing with Bill and I guess I asked him if he had anything that could help me, anything I should know.

Q And then what?

A Then I had -- well, in what sense?

Q Then what happened?

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A In regard to this letter?

Q Yes.

A Well, I showed the letter to --

Q Mr. Moore gave you a copy of the letter?

A Yes.

Q And who did you show the letter to?

A Norman Nelson.

Q When was that?

A On December 3rd, I believe.

Q Now, do you subscribe or does your agency subscribe to the NAB Code News?

A I do not subscribe to it and I don't know whether the agency does or not.

Q Did you see either the October or November issue?

A I think I know the ones you mean. October I am quite sure I got the right one, yes.

November I saw but not to read.

Q When did you see the October issue?

A I found it on my desk. It wasn't with my regular mail. I just think I -- that is when I saw it.

Q How did it happen to get on your desk?

A I think the guy that handled the account before me, who is in the next office, got it and just put it on my desk.

Q Do you remember when that happened?

A No.

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Q In October?

A I guess it was before October.

MR. HAWKE: Mr. Loevinger, since a question has been raised throughout this deposition about when the October NAB Code News was received by various people and since the record already shows it was received at NBV sometime around the 10th or 11th of November, I wonder if it would be possible for you to determine from the people at NAB who produced that periodical when it was mailed to subscribers?

MR. LOEVINGER: I will ask and if I can get any information I will be glad to tell you.

MR. HAWKE: We would appreciate that.

BY MR. DYK:

Q Getting back to this November 25 meeting that you mentioned, who was present at that meeting?

A Ron Manders of CBS and Dick Uhl and myself.

Q Who is Dick Uhl?

A He is executive vice president in charge of Creative Services.

Q Where is that?

A SSC&B.

Q Does he ususlly accompany you to meetings?

A No, the guy who ususlly accompanies me was at a Norwich meeting.

MR. HAWKE: I wonder if you could also find out when

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the November issue was mailed at the same time, if you would.

MR. LOEVINGER: Very well.

BY MR. DYK:

Q Before the end of this November 25 meeting, didn't Mr. Nelson raise with you the subject of the NAB guidelines and FTC policy?

A Yes.

Q What did he say?

A Well, on November 25?

Q Yes.

A That we would be expected to conform -- well, I will tell you how it happened. He says your Silva Thin stuff all ready? And I said I don't handle Silva Thin. He said I don't mean that, I mean Pall Mall.

I says is what ready? He said, are you going to be ready for January 1 and I said for what? And he said, to comply with the NAB guidelines.

I said, you mean you are telling me that I have to do it? And he said yes.

Q Then what happened?

A Then I went back to my office and wrote a memo to Bill Moore.

Q In your meeting with Mr. Nelson, during that time, did Mr. Nelson make a telephone call?

A He made a call either November 25 or December 3rd.

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I think it was November 25.

Q He called Mr. Helffrich at the NAB, didn't he?

A Yes.

Q What did he say to him?

A I believe he asked him to whom he had sent a letter. There was a side conversation going on, I was talking to Ron Manders, but I think he asked whether the agencies were informed and I think he was told that just the companies were told.

Q What did he tell you?

A When?

Q After his conversation with Mr. Helffrich. Did he tell you that American Brands had been informed?

A Yes.

Q Now, your agency has a great many dealings with the network, doesn't it?

A Yes.

Q And there are a large number of network and other policies that its advertising must comply with, is that right?

A All our accounts in our agency, you mean.

Q Well, take American Brands.

A There are things we must comply with, yes.

Q And you generally take care to insure that the advertising you submit complies with these guidelines or policies, don't you?

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A As best we can, yes.

Q Now, there wasn't any doubt in your mind --

A The policies of the networks we comply with.

Q I see. In general hasn't it been your experience that the networks are subscribers to the NAB Code and guidelines and follow the policies set forth in the Code and guidelines?

A Yes, I dare say.

Q There wasn't any doubt in your mind when you went to this November 25 meeting that the network would comply with the guidelines, was there?

A Not after he told me there wasn't any doubt.

Q But not when you went to the meeting, was there?

A I didn't know where it stood. I didn't know what had happened.

Q But you testified that you know that the networks usually comply with the NAB Code -- pardon me, not usually but they do comply with the NAB Code and guidelines.

A I believe they also have argued with the NAB Code.

Q On what occasions have they argued?

A I can't give a specific example but I think they have the right to do it.

Q Don't they do it in cases where the guidelines are ambiguous? Or the Code provisions are ambiguous?

A I would guess that would be an example, yes.

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Q As far as these particular new guidelines were concerned, you didn't have any doubt that the networks would abide by those, did you?

A Yes, I did, because I knew the policy was not to allow me to name Winston at SSC&B.

Q But that wasn't the only alternative under the guidelines, was it?

A To run the copy that I wanted to run, yes. At the moment that was the alternative.

Q But the network doesn't always let you run the copy that you want to run, does it?

A No, but we are just running copy that has been cleared by them.

Q But there are other ways of changing this copy advertising Pall Mall Gold without naming a competitive brand, aren't there?

A Not in my opinion without detriment to the cigarette.

Q Perhaps so, but there are other ways of doing it, aren't there?

A There must be other ways.

Q So when you went to this Nov. 25 meeting the only doubt in your mind was whether CBS would let you change the copy in a way to refer to competitive brands, is that right?

A Well, unless the networks had had discussions with the NAB and the NAB had made changes I knew nothing about it.

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Q The answer is yes, then?

MR. DYK: Could the Reporter read the previous question.

(The Reporter read the record as requested.)

MR. HAWKE: I don't understand the question. Do you understand it?

THE WITNESS: I am not sure.

BY MR. DYK:

Q When you went to the Nov. 25 meeting, was there any doubt in your mind as to whether you would be required to comply with the NAB guidelines?

A When I went to the meeting I went entirely on a different subject. This came up in the course of the meeting.

Q I am asking about your state of mind at that time. Was there any doubt?

A After Norm Nelson told me --

Q No, when you went to the meeting, before you spoke to Norm Nelson.

A I hadn't thought about it.

Q You hadn't thought about it at all?

A No. As I say, I was there for another purpose entirely.

Q I don't mean when you were thinking about it when you went into the meeting. I am saying for the period of time immediately before that meeting you knew that the copy for

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Pall Mall Golds was going to have to comply with those guidelines, didn't you?

A With whatever the guidelines that finally turned out to be that CBS bought, yes.

Q Did you have any doubt as to whether CBS would buy these guidelines?

A Ultimately they would buy some guidelines.

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Q But how about these guidelines?

A That I don't know.

Q Was there any reason to think they might be changed?

A I thought they were very confusing. I thought there would have to be changes made before they were operable.

Q In what respect were they confusing?

A Well, I don't know how much I knew when I went in. Since then a lot of water is over the dam. But there have been many things come up that make the guidelines confusing.

Q What?

A Naming the highest tar cigarette and naming the highest nicotine cigarette, naming the lowest tar and lowest nicotine and not being the same cigarette.

Q What is confusing about that.

A Well, I guess it was confusing to me because I envisioned a cigarette as being the highest in tar and a cigarette being lowest in tar.

Q Well, all it required was the number for the highest. There was no reason to think that it had to be the same cigarette, is there?

A Well, since then and even until very recently all the networks aren't in agreement on whether you even name the high tar or low tar.

Q I wasn't asking whether the networks were in complete agreement. I am just asking whether there was any confusion

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in your mind on that subject.

A Yes, I was confused when I thought of comparing myself to the two best selling filter kings and having a question raised whether that was what I could do or not when I read it to be a specific cigarette. That is the only time you have to name it and I said two and I was still told that maybe I have to name it and that to me was confusing.

Q That was prior to the Nov. 25 meeting?

A No. I don't know how much I knew about the guidelines. I don't know what detail I knew about the guidelines before that meeting.

Q Did you seek clarification of the guidelines before your conversation with Mr. Nelson on the 25th?

A No.

Q Not from any network?

A No.

Q Not from American Brands?

A How could they clarify it for me?

Q They can read.

A No.

Q Did you seek clarification from them?

A No.

Q Not from the NAB?

A I saw a letter after the meeting of the 25th written by Humphrey.

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Q I am talking about before the 25th. You stated that you became aware of these guidelines in October.

A Right, there were guidelines.

Q And you knew in general what they were about in October?

A In general.

Q Did you seek any clarification of those?

A When?

Q Between the period that you first became aware of them and Nov. 25.

A Not that I can recall.

Q Now, did you state to Mr. Nelson at the Nov. 25 meeting that you had not received any official notification of the guidelines?

A I said I heard no notification from CBS.

Q Did you use the words official notification?

A Yes. I think I did.

Q What did you mean by that?

A I meant that I thought somebody from the network would communicate with me and tell me to make changes if I had to make changes.

Q Why did you think that?

A Because they carry our commercials and if the commercials are going to be unacceptable to carry I think I should be notified.

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Q Has anybody made notifications in the past of that nature?

A Yes.

Q When?

A In a meeting during the summer when the NAB desired some changes to be made in our copy. Norm Nelson suggested finally that I speak to the NAB about it.

Q You didn't contact Norm Nelson about questions about the copy?

A Yes. I tried to resolve all my copy questions with Norm Nelson.

Q What is considered --

A This was specificially with the network.

Q What in this earlier incident that you referred to led you to think Norm Nelson would get in touch with you?

A In the earlier incident?

Q Yes, you referred to the earlier incident as an example of the situation.

A Because he did advise me.

Q Did he get in touch with you?

A I don't know whether I got in touch with him or he got in touch with me.

Q Now, referring to Plaintiff's Exhibit 68, could you refresh your recollection with that letter which is a letter from you to Mr. Moore dated October 27, 1969?

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A Yes.

Q Did you write that letter?

A Yes.

Q What did you mean by the letter?

A Apparently when we got the "Girl Lying Down" commercial back from NBC they had noted on it it is subject to further pronouncements -- this is a quote of what must have been on the story board. Subject to further pronouncements by the NAB or FTC.

Q What did they mean by that?

A It looks like there are going to be further pronouncements.

Q So you knew this commercial was conditionally accepted, is that right?

A Well, I think that is always true, isn't it? It is always subject to further pronouncements some time some day.

Q But in this case they specifically informed you of that, didn't they?

A Yes, subject to further pronouncements. It looks like he thinks there were going to be further pronouncements.

Q When did NBC approve your "Girl Lying Down" commercial, the one referred to in this exhibit?

MR. HAWKE: What?

MR. DYK: Approved the 30-second commercial referred to in this exhibit which is a letter he wrote.

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MR. HAWKE: All right.

THE WITNESS: If October 27 is a week day, it was either that day or the day before, I guess.

BY MR. DYK:

Q I see.

A I think I probably wrote this letter rather quickly.

Q Now, Mr. Allen, you mentioned in the past there were certain questions as to commercials for American Brands products raised relating to whether they complied with the NAB guidelines, is that correct?

A Yes.

Q When were those questions raised?

A Well, I don't know. It first came up on a letter from Mr. Schulte of the NAB to Mr. Frank Reed who is the business manager of television affairs. That is the first I think I knew of any problems.

Q Any problems?

A Any problems that the NAB thought they had with me.

Q With respect to what?

A Pall Mall Gold 100s.

Q What month was this?

MR. HAWKE: If you can remember.

THE WITNESS: It was very shortly after I got there, it seems to me. Like January.

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BY MR. DYK:

Q Of 1969?

A Yes.

Q What was the problem with the commercial?

A I had no problem.

Q What problem did these commercials raise under the NAB guidelines?

A These raised several points where they thought we should make changes.

Q Did you make the changes?

A Yes, we made the changes.

Q What were the changes?

A The first -- when we showed the U. S. Government report, that we would be sure that the camera frame did not cut off the top of the report or the bottom of the report, so you could see actually how long the report is. Then we would point specifically on that chart to where Pall Mall Gold 100s were. Then when we put down our cigarette and the best selling filter king that we would specify how many milligrams of tar we had and how many the best selling filter king had.

Q And none of these things had been done in the preceding advertisement, is that right?

A Not as spelled out. We put the pack down where they were but it wasn't specific.

Q You didn't feel these changes destroyed or adversely

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affected the theme of the advertising, did you?

A Well, I am not much one for changing advertising. But I felt that I'd rather make these changes and stay on the air.

Q Did you regard the changes as being significant changes?

A In that they satisfied the NAB, yes.

Q No, but significant changes from a creative point of view?

A Significant but not so significant that I couldn't live with the commercial.

Q What do you mean by live with the commercial?

A They weren't so significant in a bad sense that I didn't want to run it.

Q Now, getting back to the Dec. 3rd meeting with Mr. Nelson that you touched on earlier, who was present at that meeting?

MR. HAWKE: Can we go off the record for a second?

MR. DYK: Yes.

(Discussion off the record.)

BY MR. DYK:

Q Who was present at the meeting?

A Ron Manders, Norm Nelson, Don Booth and myself.

Q And Don Booth is who?

A He is the man who ordinarily goes with me who was on

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a trip the time before. He is a creative executive.

Q Did you and Mr. Booth have meetings with representatives of the other two networks on December Third?

A No.

Q What was the purpose of your Dec. 3rd meeting with Mr. Nelson?

A To explain to Mr. Nelson that I was not clear on what I was supposed to do to conform to guidelines.

Q Had you had any conversations with Mr. Nelson in between Nov. 25 and Dec. 3rd?

A Other than to set up a date, I don't think so.

Q And you spoke to him when you arranged the meeting?

A I don't know whether my secretary did it or I did it, I don't know.

Q What did you tell him the purpose of the meeting was?

A That I wanted to show him a board and I wanted to get some clarification from CBS on several points.

MR. DYK: Can you show the witness what I believe is CBS Exhibit 6?

MR. HAWKE: Yes.

BY MR. DYK:

Q I would like to clear one thing up for the record at this point. I believe in this third frame down there that the words nicotine or the numbers appearing after them were not

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on the commercial as originally submitted. In fact, I think these doodlings were added recently when Mr. Nelson was trying to explain to counsel how easily the numbers could be added.

This was the story board that you brought with you to that meeting?

A Yes.

Q What did you say to Mr. Nelson?

A I said to Mr. Nelson, first of all, I was confused on audio and video. Because there was a contradictory letter -- to me it was anyway -- from Mr. Helffrich to Mr. Hetsko which I had just gotten where it was sort of and/or, where I believe Norm thought they had to be at that time both audio and video.

Q Had you gotten the Oct. 22 letter in between your Nov. 25 meeting and the Dec. 3rd meeting?

A Yes.

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cmc 1
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Q Was there any other respect in which you indicated to Mr. Nelson that you were confused?

A Confused in how to do it in 30 seconds?

Q No; confused as to what the FTC --

A I mentioned this as a positive, was confused in how to do it in 30 seconds.

Q But you were aware it was required in both audio and vido?

A I was not sure.

Q But aside from your unsureness in this one area, was there any other confusion in your mind as to what the NAB and FTC policy required?

A I was confused about CBS's policy in not naming Winston.

Q But, in other words, you were confused as to whether they would accept --

A Why I thought this answered it and I was surprised when they said this did not answer it, he was afraid.

Q But you said you were aware of that requirement?

A What requirement?

Q The requirement of the NAB or FTC guidelines that either you name the competitor or change the advertising so it doesn't refer to a specific brand?

A I thought I had done that.

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cmc 2

Q Would you answer the question?

A Right.

I would like to go over that once again.

(Reporter read the record.)

BY MR. DYK:

Q Now, you just indicated that you thought you had complied with that requirement by amending the advertising so that it referred to the two best selling filter kings, right?

A Yes.

Q And how did you happen to make that proposed change in the advertising?

A How did I happen to make it?

Q Yes.

A Well, my creative people rewrote the copy this way.

Q Why?

A Because we don't want to name Winston and when we were naming one cigarette, a specific cigarette, we had to, according to what I hear, but by naming two we are not naming a specific, I didn't think I would have to name Winston.

Q Now, did you think this story board in other respects complied with the NAB guidelines?

A Yes.

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cmc 3

MR. HAWKE: Would you read that last question, please?

(Question read.)

BY MR. DYK:

Q In fact, however, the story board does not include any reference to the high and the low for nicotine in the video, does it?

A No, it does not and at that time I didn't know you had to do it.

Q You didn't know you had to do it?

A No.

Q You thought you had to name the high and low for tar but not for nicotine?

A Right. I thought that if you mentioned nicotine in your claims, then you would have to. But I thought if I didn't bring up nicotine in my claims I didn't have to bring it up at all.

Q What were the changes that were made in the existing ad to produce this story board?

A Supers are changed, copy is changed.

Q Could you tell us in what respect?

(No response.)

Q Why don't we go frame by frame?

A I don't see any change in the opening two frames.

Q Now, in the third frame?

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cm4

A There were no supers on that frame before, as I recall.

Q You mean by that answer that the numbers, the part 4 milligrams and part 36 milligrams that appear in the third frame were not in the earlier advertising?

A Correct.

Q How about the fourth frame?

A Again the super tar 4 milligrams, tar 36 miligrams were not in it.

Q This was added?

A Yes.

Q How about the six frame?

A The pictorial card is changed to show two cigarettes coming in rather than just one and the super was changed.

The super was changed.

Q What was the language in the earlier super?

A Tar 19 and Tar 21, I think.

Q So that the super was changed in that the reference to nicotine 1.3 versus 1.4 milligrams was added, right?

A Yes. That is an addition. The copy there is also changed next to that frame.

Q We will get to that. Are there any changes in the last three frames?

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cmc 5

A I don't recollect any changes there.

Q In what respect was the copy changed?

MR. HAWKE: Mr. Dyk, the earlier ad as you well know is marked as CBS Exhibit No. 3. Is there any point to be served with three or four witnesses left to go on this evening in asking this witness to go over in great detail and tell you the differences in each frame?

They are perfectly obvious. This is an utterly senseless deposition. We have a particular schedule, I just implore you, as Mr. Loevinger said last night, out of differences to shortness of life, to get the things moving.

BY MR. DYK:

Q What were the differences in copy?

A The copy was changed in frame 6.

Q In what respect?

A We used to say lower in tar and than the best selling filter king and now it is changed.

Q You were willing to produce this advertisement if it was acceptable to CBS, weren't you?

A I don't know.

Q You don't know?

A No.

Q Why don't you know it?

A Inever had approval to do it.

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cmc 6

Q Younever showed this to the client before?

A Yes, I believe he had seen it but he didn't say go ahead and make it.

Q He didnt say go ahead and make it but he did say go ahead and show it to the network?

A I don't think he said that to me, I let him know I was going to take it to the network.

Q Did he object?

A No.

Q Who is this, Mr. Moore?

A Yes.

Q What is your normal pracice when you prepare a story board? Do you show it to the client before you take it to the network?

A Yes.

Q Does the client usually pass on it?

A It varies. He can pass on it if he likes it, he takes it apart if he does not.

Q Do you ever show it to the network if he doesn't like it?

A No.

Q What does he say if he likes it?

A He doesn't always say the same thing. He indicates to me that he likes it.

end 23

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Q Sometimes he simply doesn't object, is that right?

A I suppose.

Q And then of course you take a story board to the network and seek their approval, is that right?

A Correct.

Q And if the network approves it you produce the commercial, right?

A Not necessarily. I have to go back to the American Tobacco Company to get permission to make a commercial. Submitting a story board is not tantamount to making a commercial.

Q In instances where American Tobacco has approved a story board, has there ever been an instance in which they refuse to permit you to prepare the commercial once it has been approved by the network?

A I can't think of anything at the moment.

Q You thought this was a good commercial, didn't you?

A No. I thought my other commercial was better.

Q But you thought this was acceptable, didn't you?

A I thought it was making the best of what was at hand.

Q It would have been your recommendation that the commercial be produced if approved by CBS, wouldn't it have been?

A If we were convinced that we had to make these changes, yes.

Q Why do you advertise Pall Mall Gold with reference

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to tar?

A To show where we are in relation to something we think people understand. We believe that the biggest thing we had to overcome to sell the cigarette was to get rid of the image that it was an extremely high tar cigarette, one of the highest in the world.

Q Why would that hurt the image of the cigarette?

A Well, people wouldn't buy that many.

Q Why wouldn't people buy that many?

A Well, people don't -- when anything is extreme, the sales are usually less than being in the norm.

Q You never advertised Pall Mall Gold as a high tar cigarette?

A No, we did not.

Q Why not?

A We saw no advertising purpose to do that.

Q But you saw a purpose in advertising it as a low tar cigarette?

A No, we didn't advertise it as a low tar cigarette.

Q You advertised it as a lower tar cigarette?

A Being lower than the best selling filter king.

Q And you thought that was a useful message?

A Yes.

Q Why, because it would cause people to buy more?

A Yes.

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Q And why would people buy more?

A Well, it must have had a meaningful television commercial for them.

Q What was meaningful about it?

A It is meaningful that we put them in an area that attracted people.

Q It had nothing to do with health implications?

A No.

Q Did you take a similar story board to ABC and NBC similar to CBS Exhibit 6?

A No, I didn't take them, we sent them.

Q Mailed them?

A One went by messenger and one went by mail.

Q Was this after the meeting with Mr. Nelson on the 3rd of December?

A We probably have a transmittal letter. I wrote a letter to Larry Treger, and whatever the date of that letter is is the day I sent it.

MR. LOEVINGER: About a half hour ago counsel asked us about the mailing of the NAB Code News. We have adopted an expeditious though not necessarily entirely reliable method of inquiry. We have called our colleagues at NAB and they have called the printers and we have a hearsay report that I believe to be accurate but don't absolutely vouch for.

The October issue, I am informed, was mailed on

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November 7, 1969 and the November issue of the Code News, I am informed, was issued December 8, 1969. That is our expeditious response. We believe it to be correct but, as I say, it might not be all together accurate.

MR. HAWKE: Thank you very much, Mr. Loevinger.

Can we stipulate that if it wasn't mailed until November 7 it would have been impossible for somebody to see it in October?

MR. LOEVINGER: Yes, I would like the record to show Mr. Allen's testimony also related to other ways he became aware of these policies, long before that time.

BY MR. LOEVINGER:

Q Who is Larry Treger?

MR. HAWKE: Come on, we had his deposition here yesterday, do you have to ask a question like that?

BY MR. LOEVINGER:

Q Can you answer the question?

A He works for NBC.

Q What did you say in the letter?

A Here is a copy of the story board and I would like to know as soon as possible whether it would be acceptable or not. That is the gist of it.

Q Did NBC tell you it was not acceptable?

A He called me back a couple of days later and said he felt it was not acceptable.

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Q What was your experience at ABC?

A ABC? I spoke on the phone to Cynthia Fates and she said in the present form she did not think it was acceptable.

Q Since that time have you made any effort to prepare any copy which would be acceptable?

A No.

Q Why not?

A First of all, I haven't been asked to. Secondly, I have been doing other things.

Q Were you asked to prepare the copy which is CBS Exhibit 6?

A Is that it there?

Q Yes.

A I don't know if it was my idea or their idea.

Q But you discussed it with American Brands before --

A They were aware of this before I brought it to Norman Nelson.

Q I am referring to the period before this exhibit was prepared. Did you talk with them about the preparation of exhibit 6 before it was prepared?

A I have a letter that I wrote after this meeting that might say. I don't recall.

Q You don't recall whether you ever discussed this copy with anyone at American Brands before you submitted it to the network?

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A Yes, I told you I did.

Q Pardon me, before you prepared it?

A No, I don't recall.

MR. ADLER: Off the record.

(Discussion off the record.)

BY MR. DYK:

Q Mr. Allen, does American Brands advertise Pall Mall Gold at all on national spots?

A I don't believe so.

Q How long, do you remember, did it take you from the time you decided to do so to prepare this new story board that is CBS Exhibit 6?

A To prepare that board?

Q Yes.

A I don't know. It is between the 25th and the 3rd. You see, I don't remember whether I talked to my copywriter that day and he thought about it for a day or what. The actual production of the board probably took half a day once it was created.

Q How long would it take to change the commercial once the story board had been approved?

A I can't tell you, I don't know.

Q You are in this business and you don't know how long it would take?

A No, I don't. You have to get a studio because there

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is new shooting, you have to do new supers, you have to get an announcer and do a new track.

MR. DYK: I think the simplest thing at this point, it might save time, why don't we go on to the next examiner, I may have one or two further questions after he finishes.

MR. ADLER: I have no questions.

MR. LOEVINGER: I have no questions.

MR. KENNEY: No questions.

MR. DODELL: No questions.

MR. DYK: I do have a few further questions.

BY MR. DYK:

Q Mr. Allen, are you aware what Lorillard or Reynolds and their agency, what they intend to do to have Doral and True advertising comply with FTC policy?

A No.

Q Their advertising does pose problems under the policy, doesn't it?

A I don't know. Doral just says what they are.

Q They make a reference to tar, don't they?

A Yes, but we have so many with tar, I think.

Q How about the True advertising?

A I am not that familiar with it.

Q What is the purpose of referring to the best selling filter kings in the current Pall Mall Gold advertising?

A Well, first of all, we feel that people think smoking

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a longer cigarette has more tar than a king size.

Q Do you think people know what the best selling filter king is?

A A lot of people know.

Q Is the ad designed to get them to switch?

A To get everybody to switch.

Q What is the answer to that question?

A Them and everybody else we would like to switch to our brand.

Q There are some people who don't know what the best selling filter king is, aren't there?

A I think that is safe to say, yes.

Q Do you have any idea what advertising you will run for American Brands if the preliminary injunction on this case is denied?

A No.

Q Have you ever discussed that issue with anyone?

A In the sense that I haven't been told to make new commercials, no.

Q Have you discussed the issue with anyone?

A Well, I was told really not to concern myself with it in making different commercials.

Q Who told you that?

A Bill Moore.

Q When?

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A I have no idea.

Q December?

A Oh, yes.

Q Earlier?

A No.

It would have to be December.

Q What time in December?

A Some time after this.

Q Early in December?

A I really don't know.

Q How did this happen to be discussed between you and Mr. Moore?

A Probably over the fact that this wasn't going to make it.

Q Did you then suggest to him that maybe you should prepare new copy?

A No, I don't know how to prepare new copy.

Q Prepare new copy?

A I don't know how to, really. I don't think I can use these guidelines and do a commercial that sells cigarettes.

Q But he told you not to try?

A I don't know if those were his exact words.

Q But that is about it?

A I suppose so, yes.

Let me put it another way. I didn't feel any

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pressure that I should be doing something that I was overlooking.

MR. DYK: That is all I have.

MR. KRASH: Is the witness excused?

MR. HAWKE: I have a couple of questions.

xxxxxx CROSS-EXAMINATION

BY MR. HAWKE:

Q Would you refer to Plaintiff's Exhibit 68, please, Mr. Allen.

A Yes.

Q That is the letter in which you informed Mr. Moore that NBC has approved the commercial entitled "Girl Lying Down"?

A Yes.

Q After October 27, 1969, did anybody at NBC ever communicate to you that there had been further pronouncements by the NAB or FTC that would require changes in "Girl Lying Down"?

A In this commercial here?

Q Yes.

A No.

Q To the best of your knowledge, when "Girl Lying Down" was submitted for clearance to NBC, did they have reason to believe that you intended to run that commercial after January 1, 1970?

MR. KENNEY: I object to the question.

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MR. HAWKE: Repeat the question.

MR. LOEVINGER: I object to the question. You can't ask him for somebody else's state of mind.

MR. HAWKE: Answer the question, please.

THE WITNESS: Well, it is a very expensive commercial to run for two months. I would assume they would think it would run longer.

BY MR. HAWKE:

Q How long would you normally expect a commercial such as that, that was cleared on about October 27, to run in the ordinary course of things?

A I would hope it would run forever. Because that means the sales are going up. But I had no way of knowing that.

Q I want to refer you to NAB Exhibit No. 31, which is a copy of a letter written by you to Mr. William Moore. Would you take a moment just to refresh your recollection as to that letter?

A Yes.

Q Now, at the time of that meeting on December 3, were you aware of any policy of the Columbia Broadcasting System with respect to the naming of competitors in commercials?

MR. DYK: He has testified to that already.

BY MR. HAWKE:

Q Can you answer my question?

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A My understanding is that CBS did not allow it.

Q Did you discuss that policy with Mr. Nelson at the December 23 meeting?

A Yes, I did.

Q Did Mr. Nelson tell you if you were to name Winston in your Pall Mall commercials that CBS wouldn't run those commercials at that time?

A I believe he said he would have to talk it over with Tankersley?

Q Did CBS ever communicate to you a further decision of their company as to whether they would permit you to name Winston in your commercials?

A They have not told me, no.

Q At the meeting on December 3rd, did Mr. Nelson tell you that it was his opinion that compliance with the FTC and NAB standards would be virtually impossible on a 30-second commercial?

A I don't know if he used the words "virtually impossible". But that is the gist of what he said.

Q I want to refer your attention to the next to the last paragraph on page 2 of NAB Exhibit 31, and ask if that refreshes your recollection about what Mr. Nelson said.

MR. DODELL: Object to the question, the witness didn't say that he couldn't recall.

THE WITNESS: Yes, this is the report of the meeting and it is accurate.

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BY MR. HAWKE:

Q And your report said Mr. Nelson indicated his view was that it was virtually impossible to do a commercial in the 30 seconds allowed, is that right?

A Yes.

Q Is that an accurate reflection of what Mr. Nelson told you?

A Yes.

Q Did Mr. Nelson tell you that to the best of his knowledge American Brands was the only cigarette company that was making a comparison of its cigarette to another specific cigarette with respect to tar content?

A Yes.

Q Did he indicate to you his opinion that the requirement of naming the competitor might be deliberate rather than coincidence on the part of the Federal Trade Commission.

MR. DODELL: I will object to the form of the question on the grounds it doesn't say deliberate to what and suggests an answer to the witness.

BY MR. HAWKE:

Q Answer the question.

A I can't -- this letter is not quotes, you know; this letter is the gist of the conversation. The gist was it must have to cross your mind since you are the only one, that perhaps it wasn't done in error.

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Q You were examined on CBS Exhibit No. 6. Did you ever get permission to produce that commercial for American Brands?

A Never.

Q Has it been produced to the best of your knowledge?

A No.

MR. HAWKE: I have no further questions.

BY MR. LOEVINGER:

Q Did you ask for permission?

A No.

Q Did you ever present CBS Exhibit F to American Brands with the suggestion that it be produced?

A No.

Q But you did testify earlier that you did submit CBS Exhibit 6 to American Brands?

A Yes.

BY MR. DYK:

Q You indicated you would take it to the networks for approval, is that correct?

A Yes.

Q And they indicated no objection that you were doing that?

A Right.

Q And they indicated no objection to the content of the commercial, right?

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A They don't want to change the commercial either. To that extent they objected to the content of the commercial.

Q What exactly did Mr. Moore say?

A I could submit it to the networks.

Q What did he say about the content of the commercial?

A I don't recall what he said.

Q Do you recall his raising any objections to the content of the commercial?

MR. HAWKE: That surely goes beyond the scope of the cross-examination. My question was whether he ever got permission to produce the commercial.

MR. DYK: No, it doesn't, Mr. Hawke.

THE WITNESS: My feeling is that this was our own personal guideline. If the network said, okay, produce it, it doesn't mean that we would produce it. We would know where we stood, at least, at that moment.

BY MR. DYK:

Q But you had no reason to think that American Brands would object to the production of thecommercial, did you, if the network approved it?

A I don't know.

Q But Mr. Moore said nothing that would indicate to you that the content of the commercial would be objectionable, did he?

A The content is objectionable in that we don't want

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to change a word of what we are doing.

Q I understand that. But with that reservation?

A We did not have any further discussion other than looking at the board, I don't believe. I can't recall any discussion.

Q Did Mr. Moore say anything to indicate that the commercial would not be produced if it were approved by the network?

A No, I don't believe he said that.

Q Subsequent to your Dec. 3rd meeting with Mr. Nelson, did you ever ask Mr. Nelson if CBS would allow you to name a competitor?

A I don't believe so.

Q Did you ever submit any copy to Mr. Nelson that named the competitor?

A No.

MR. DYK: That is all I have.

MR. DODELL: I have some questions.

BY MR. DODELL:

Q Referring to Plaintiff's 68 which is your letter to Mr. Moore, do you know the date that NBC approved "Girl Lying Down?"

A I believe it was October 26.

MR. HAWKE: He said it was Oct. 26 or 27. He testified that he probably wrote the letter on the day he got

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notice of approval.

MR. DODELL: All right.

BY MR. DODELL:

Q Do you believe the further pronouncements by NAB or FTC relative to tar and nicotine claims in advertising, that this reference in the letter referred to the pronouncements that shortly thereafter wer published in the Code News?

A I don't know.

MR. HAWKE: Are you asking whether something earlier in time referred to something that wasn't in existence at the time the reference was made?

MR. DODELL: I didn't understand your question.

MR. HAWKE: You are asking whether this is --

MR. DODELL: Let's start again.

BY MR. DODELL:

Q Do you think that this letter was written after the guidelines adopted by the NAB that incorporate the FTC policy?

MR. HAWKE: That is not a matter of opinion. We will stipulate this letter was written after Oct. 22 when NAB announced its policy guidelines and after Oct. 8 when FTC announced its policy.

end
5A

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BY MR. DODELL:

Q You wrote this letter, Mr. Allen, to Mr. Moore on October 27, 1969, and the letter says that the approval was subject to further pronouncement by NAB or FTC relative to tar and nicotine claims in advertising and shortly thereafter you became aware of some further pronouncements by NAB, is that correct?

MR. HAWKE: No, that is misleading.

Are you talking about pronouncements that were made previous to that time or after that time?

You are misleading the witness.

MR. DODELL: All right; your objection is noted, let the witness answer the question.

MR. HAWKE: I think it is a misleading question. There were no further pronoucements, as you well know. There were pronouncements of October 27 and October 8.

MR. DODELL: You made loud and frequent complaint about the length to which this proceeding is extending. I have asked the question. You noted your objection and let the witness answer the question.

THE WITNESS: Let me hear the question again.

(Reporter read the question.)

THE WITNESS: I don't know what I knew about NAB on the 27th and what I knew after.

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BY MR. DODELL:

Q We already stipulated that the Code News was mailed November 7 and you found out about them -- or one of the sources of information about the NAB guideline you received from the Code News; is that right?

A I saw a copy of the October Code News.

Q Right.

Did you consider this letter and the approval that NBC had given in this letter affected in any way by the guidelines that you read about in the Code News?

MR. HAWKE: Are you talking about the October 22 guidelines announced in the Code News?

MR. DODELL: If the witness doesn't understand -- Mr. Hawke, as I just said, you have complained about the length of the proceedings. If the witness doesn't answer the question, I will be pleased to rephrase it.

MR. HAWKE: I would like to understand the question.

MR. DODELL: Maybe the witness can explain it to you, Mr. Hawke.

MR. HAWKE: I doubt if he can.

THE WITNESS: The NBC commercial "Girl Lying Down," as far as I know, is still approved and still on the air. I have not been told to take it off the air.

MR. DODELL: Would he read my question, please.

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(Reporter read the question.)

THE WITNESS: As of right now, no.

BY MR. DODELL:

Q Did you think about it?

A I had forgotten this letter.

Q You had forgotten about the letter when you read the Code News?

A Yes.

Q Do you recall seeing an article in the Wall Street Journal that dealt with the NAB guidelines that adopted the FTC policy?

MR. HAWKE: Is there such a thing in the record?

MR. DODELL: There is a reference in it that it was transmitted to one of the agencies, I don't know which agency but since there is such testimony it is fair to ask Mr. Allen if he saw such an article.

THE WITNESS: I don't know if I did.

BY MR. DODELL:

Q Now, one other question and this is in relation to Mr. Hawke's questions to you regarding the effect of the FTC guidelines on American Brands advertising.

Isn't it true that the FTCpolicy statement and the NAB guidelines affect the advertising of other cigarette manufacturers that make reference to tar and-or nicotine statement as well as American Brands.

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cmc4

MR. HAWKE: I object to the form of the question. It calls for a legal conclusion from the witness.

MR. DODELL: That is noted.

THE WITNESS: I don't know firsthand.

MR. DODELL: That is all.

BY MR. KENNEY:

Q Between October 27 and December 5, 1969, Mr. Allen, did you have any conversations with Larry Treger of NBC concerning Pall Mall ads?

A No; I don't believe so.

Q Did you have any written communications with him, either receive any from him or send any to him?

A Not that I can recall.

Q Did you send any copy other than the copy you sent to all the networks on or about December 1?

A Anything different?

Any copy different than that?

A No.

Q You did discuss the December 1 or December 2 ad with Mr. Treger, is that right?

A Yes.

Q And he told you in effect that that --

A Let's see, December 1? Excuse me, I am not trying to confuse you. It is the ad you sent to all three?

A I sent all ads to all three networks.

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MR. HAWKE: Is that CBS 6 that we are talking about?

MR. KENNEY: It is Plaintiff's 63, I believe.

MR. DYK: It is the same as CBS 6, we stipulated to that.

BY MR. KENNEY:

Q Did you discuss that ad with Mr. Treger?

A Yes.

Q And he told you that ad would not be run by NBC?

A Yes.

Q Did Mr. Treger discuss with you why it would not comply?

A At some point he did but he also left the feeling there were other points.

Q He told you he would not run that ad after January 1; is that right?

A Well, that ad was never made.

Q Well, the story board you were discussing.

You would not run an ad similar to that?

A Yes.

Q And did the Girl Lying Down ad which you testified was approved on October 27 have content in it which was similar to the content in Plaintiff's Exhibit 63 which Mr. Treger said was not acceptable after January 1?

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A This is the identical same copy that is in that.

Q Right.

MR. HAWKE: Let the record show the witness was comparing Plaintiff's Exhibit 63 with CBS 6.

THE WITNESS: I believe the copy is identical, without reading it word for word.

MR. KENNY: Can we go off the record for a moment?

(Discussion off the record.)

BY MR. KENNEY:

Q I show you a document marked CBS Exhibit 3.

A Yes.

Q Now, is that the Girl Lying Down ad which you testified Mr. Treger approved on October 27?

A Yes.

Q Does that ad have content in it which, in your discussion with Mr. Treger on or about December 5 Mr. Treger said he would not run after January 1, 1970?

MR. HAWKE: That wasn't the witness' testimony.

The witness testified that Mr. Treger said -- he did not testify that Mr. Treger said Plaintiff's Exhibit 63 would not run after January 1, 1970.

BY MR. KENNEY:

Q Did Mr. Treger tell you he would not run this plaintiff's Exhibit 3 after January 1, 1970?

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That is the ad you submitted to him and you had the conversation about December 5?

A Yes, he would not run this and by the same token he wouldn't run this. They are the same copy.

Q The "this" you are pointing to is CBS Exhibit No. 3, is that correct?

A Yes.

Q And that is the Girl Lying Down ad approved on October 27, 1969?

A Right.

Q So it was clear to you, then, on December 5 that when Mr. Treger said he would not run Plaintiff's Exhibit 63 after January 1, it was also clear to you that he would not run the document we marked as CBS Exhibit 3 which is identical to "The Girl Lying Down" ad which he approved on October 27?

A You want my opinion?

My opinion is that he wouldn't run it.

MR. KENNEY: That is all.

REDIRECT EXAMINATION

xxx

BY MR. HAWKE:

Q Between October 27 and December 5, 1969, did Mr. Treger ever tell you explicitly or give you any other reason to believe that NBC would not run the "Girl Lying Down" commercial as reflected in CBS 3?

MR. KENNEY: I believe he testified that he had no

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conversations at all with Mr. Treger.

THE WITNESS: I didn't get the dates.

BY MR. HAWKE:

Q Between October 27 and December 5, 1969, did Mr. Treger or anybody else at NBC give you any reason to believe that NBC would not continue to run the Girl Lying Down commercial as reflected in CBS Exhibit 3?

A No.

MR. HAWKE: No more questions.

MR. DYK: Could we just pick up one loose end at this point?

This is the New York Times ad and we would like to offer it at this time, CBS Exhibit 11.

MR. HAWKE: Do you have copies of that?

MR. DYK: We will get copies.

Will you stipulate this is an accurate ad?

MR. HAWKE: There appears to be something missing from it.

MR. DYK: With the exception of the brand identification which may appear in the lower lefthand corner.

MR. HAWKE: We will stipulate subject to checking it and informing you if there are any material variances.

Will you provide us with copies of this tomorrow?

MR. DYK: Yes.

Off the record.

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(Discussion off the record.)

MR. DYK: I think we are amenable to leaving the rest of the witnesses without prejudice to calling them again after the preliminary injunction.

MR. KRASH: You are doing this on behalf of all the dependents, they are all waiving their right to examine the remaining witnesses.

MR. LOEVINGER: At this time, assuming it is held as scheduled on the 29th.

MR. DYK: One further caveat, that has to do with affidavits.

Do you plan to use affidavits of any of the witnesses who are waiving?

MR. KRASH: If the hearing of the preliminary injunction is on another date --

MR. LOEVERING: If there is any significant postponement I don't know what will happen.

MR. KRASH: All right; if there is any significant postponement this does not apply on either side, then.

MR. DYK: Another condition of the waiver, that you do not intend to call any of these people as live witnesses, do you?

MR. KRASH: We do not. My understanding is that you are not calling anybody as witnesses at this hearing. Because we have nothing to rebut at the hearing in terms

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of live witnesses.

MR. LOEVINGER: That is my present intention.

MR. KRASH: The only problem I have is if you refer to anything any of these witnesses have said -- no, all right.

MR. LOEVINGER: My intention is to argue on the 29th on the record as now made.

MR. KRASH: All right. So that the depositions are now concluded on the part of both parties, is that right, for purposes of the preliminary injunction motion?

MR. DYK: Let's make it clear.

You do not intend to call anybody else as a live witness or use anybody else's affidavits?

MR. KRASH: Other than people who have previously testified, that is right.

MR. DYK: And you understand we would object to that.

MR. KRASH: Right. We have outstanding our requests for documents and we assume you will advise us of your response to that.

MR. DYK: You can assume we are going to tell you what we are going to do about it.

MR. KRASH: All right.

Thank you very much.

(Whereupon, at 7:05 p.m., the taking of the deposition was concluded.)

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CERTIFICATE OF NOTARY PUBLIC

I, George A. Monick, a notary public, do hereby certify that the witness whose testimony appears herein appeared before me and was duly sworn by me.

George A Monick

Notary public in and for the District of Columbia

My commission expires

December 31, 1970

CERTIFICATE OF COURT REPORTER

I, Edwin F. Donovan, Court Reporter, do hereby certify that the testimony contained herein is a true record of the testimony given by said witness, and I further certify that I am neither attorney nor counsel for, related to or employed by any of the parties to the action in which this statement is taken; and, further, that I am not a relative or an employee of any attorney or counsel employed by the parties hereto, or financially interested in the action.

Edwin F Donovan

Court Reporter

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